

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MARCH 19, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2148

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**JAMES M. MC CABE
and PAMELA K. MC CABE,**

Plaintiffs-Respondents,

v.

**MIDWEST EVERGREENS, INC.
and L. J. WEBSTER,**

Defendants-Appellants,

**PAUL R. DAVIDSON,
REALTY WORLD-WEISS
& ASSOCIATES and
JEAN MC DONOUGH,**

Defendants.

APPEAL from a judgment of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Midwest Evergreens, Inc. and L. J. Webster (collectively Webster) appeal a judgment awarding James and Pamela McCabe damages for Webster's negligent misrepresentation regarding a septic system that services a residence Webster sold to the McCabes. Describing a fifty-gallon drum under the front porch as a "septic system" and describing the misrepresentation as a nondisclosure, Webster challenges the sufficiency of the evidence to support the jury verdict and the jury instructions. He also argues that the McCabes were negligent in relying on his representations.¹ We reject these arguments and affirm the judgment.

The McCabes sought to purchase a house from Webster. The "facts sheet" given to the McCabes represented that the property had a well and a septic system. The McCabes told Webster's real estate broker that they wanted Webster to have the septic system pumped if it had not been pumped in the last year. The broker inserted that condition in the offer to purchase. Webster submitted a counteroffer modifying the price and payment schedule, but stating "the rest of the offer remains the same." In an addendum to the offer to purchase, Webster disclaimed all warranties as to the condition of the property and sold the property "as is." At closing the McCabes discovered that the septic system had not yet been pumped. Webster orally agreed to have the septic system pumped immediately after closing at his expense. A few days after closing, when the septic system failed, the McCabes were unable to find the septic tank. Eventually while removing the front porch, they found that the "septic system" consisted of a deteriorated fifty-gallon drum buried under the front porch, inaccessible except by removing the porch. The jury found that Webster negligently misrepresented the condition of the septic system.

An "as is" clause puts the burden on the buyer of property to determine the condition of the property being purchased. The shifting of the burden, with nothing more, protects the seller and his agent from negligent misrepresentation claims premised on nondisclosure. *Grube v. Daun*, 173 Wis.2d 30, 61, 496 N.W.2d 106, 117 (Ct. App. 1992). However, "once the seller or his agent has made an affirmative representation about some aspect of the property, the buyer is entitled to rely on that statement and expect full and fair

¹ Webster also raises three issues relating to the judge's conduct, evidentiary issues and jury instructions that relate to the first trial on damages. The trial court ordered a new trial on damages. That trial was to the court. The alleged errors in the first trial on damages are irrelevant and will not be addressed.

disclosure of all material facts relating to that aspect of the property." *Id.* We reject all of Webster's arguments that are based on his characterization of this case as a "nondisclosure" of the condition of the "septic system." Webster's promise to have the septic system pumped is a misrepresentation of fact that is not a mere nondisclosure. An inaccessible drum under the front porch is not a "septic system" and it is a misrepresentation to suggest that the house has a septic system that was capable of being pumped. Insertion of the "as is" clause does not protect Webster from a lawsuit based on his misrepresentation of the existence or accessibility of the "septic system."

Sufficient evidence supports the jury's finding that the McCabes were not negligent for failing to have the house inspected before closing. The jury's verdict will be sustained if there is any credible evidence to support it. *Meurer v. ITT Gen. Controls*, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979). The McCabes had no reason to suspect that the septic system would be totally inadequate, impossible to find and inaccessible. They received assurances from the tenant who occupied the house and reasonably relied on Webster's representation that the tank could be found and pumped. Despite the existence of the "as is" clause, the McCabes were not necessarily negligent for failing to inspect the septic system in light of Webster's affirmative representations.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.